

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: August 11, 2005

TO : Curtis Wells, Regional Director  
Region 16

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: UFCW Local 540 (ConAgra Foods, Inc.)  
Case 16-CB-6903

536-2561

536-2562

The Region submitted this Section 8(b)(1)(A) case for advice as to whether it should issue a complaint and, as in Teamsters Local 270 (UPS),<sup>1</sup> ask the Board to reconsider current law permitting a union to reject an employee's checkoff revocation submitted shortly prior to an established window period. We conclude that the Region should dismiss the charge, absent withdrawal.

### FACTS

United Food & Commercial Workers Local 540 ("the Union") represents a unit of employees at the ConAgra Foods, Inc. ("the Employer") facility in Fort Worth, Texas. The parties' current collective-bargaining agreement contains a dues checkoff clause allowing for the voluntary deduction of Union dues from employee paychecks.<sup>2</sup>

Vernon Lofton, the charging party, has worked for the Employer for 16 years. On March 26, 2002, he joined the Union and signed a dues checkoff authorization that stated, in pertinent part:

This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent on my present or future membership in the Union. This authorization and assignment shall be irrevocable for the period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 540, whichever occurs sooner and from year to year thereafter, unless not less

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<sup>1</sup> Case 15-CB-5256 [*FOIA Exemption 5* .]

<sup>2</sup> The parties' contract does not contain a union-security clause because Texas is a so-called "right-to-work" state. See Tex. Lab. Code Ann. § 101.053 (1993).

than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union individually written notice by certified letter to the Secretary-Treasurer of Local 540 of revocation bearing my signature thereto.

In January 2003, Lofton resigned from the Union and revoked his checkoff authorization. The Union accepted his resignation but told him he would have to continue to pay dues. Lofton's revocation was not filed during the window period specified in his checkoff authorization, which was from February 12 to 27. The Employer nevertheless honored his request and ceased deducting dues. The Union did not raise any objections at that time.

Over a year and a half later, in September 2004, the Union conducted a membership audit and discovered that Lofton and one of his coworkers, Mary Renee English, had not been not paying Union dues. On October 8, 2004, the Employer recommenced deducting dues from Lofton's paycheck based on the Union's request. Lofton then complained to the Employer that Union dues were improperly being deducted from his paycheck.

In December 2004, the Employer's personnel director told Lofton that the Union was deducting dues because he had filed an untimely revocation. The Employer then informed Union Representative Prudencio Aguilar, Jr. that Lofton was upset about the resumption of dues deductions. Aguilar left instructions to have Lofton contact him.

Lofton asserts that in mid-January 2005,<sup>3</sup> he asked Aguilar to provide him with his "anniversary date," i.e., the date on which he signed the checkoff authorization, and that Aguilar agreed to do so. Aguilar does not remember Lofton asking for his anniversary date, but states that it was around this time that he told Lofton about the Union membership audit and that Lofton had to pay dues because the Union did not have a letter of revocation from him.<sup>4</sup>

On January 31, Lofton sent a certified letter to the Employer, with a copy to the Union, in which he resigned

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<sup>3</sup> All subsequent dates are in 2005.

<sup>4</sup> Aguilar states that when employee English, i.e., the other unit employee the Union audit revealed as not paying dues, asked for her anniversary date, he promptly provided it. English confirms that she received her anniversary date less than a week after asking for it.

from the Union and revoked his checkoff authorization. Lofton did not include a request for his anniversary date.<sup>5</sup> On the same day, he obtained his anniversary date -- March 26, 2002 -- from the Employer, and thereby learned that the window period for revoking his checkoff was February 12 to February 27.

In early February, Lofton told Aguilar that he had obtained his anniversary date from the Employer and that, although he had sent a checkoff revocation letter to the Union, he believed it was untimely. Lofton then said that he would send another, timely revocation letter.

By certified letter to the Employer dated February 15, with a copy to the Union, Lofton again resigned from the Union and revoked his checkoff authorization. This letter was within the checkoff authorization's window period.

By letter dated February 24, the Union responded to Lofton's January 31 letter. The Union accepted Lofton's resignation from the Union, but rejected his checkoff revocation because it was untimely.

Subsequently, the Union accepted Lofton's February 15 checkoff revocation. By letter dated March 2005, the Union asked the Employer to stop deducting Union dues from his paycheck. The Union sent a copy of this letter to Lofton. Since March 18, the Employer has not deducted any additional Union dues from Lofton's paycheck.

On March 1, Lofton filed a Section 8(b)(1)(A) charge against the Union alleging that it had violated the Act by not permitting him to resign from the Union, by not providing him with information necessary to revoke his checkoff authorization, and by not honoring his checkoff revocation. The Region has found no merit to the first two allegations and those issues have not been submitted for advice.

#### **ACTION**

We conclude that the Region should dismiss this charge, absent withdrawal, because the Union's actions were in compliance with Board law and this case does not present a good vehicle to argue that the Board should adopt a new rule regarding checkoff revocation shortly before the commencement of a window period.

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<sup>5</sup> Contrary to the contents of the January 31 letter, Lofton has asserted that it contained a second request for his anniversary date.

Under Section 302(c)(4) of the Act, unions must provide their members with the ability to revoke their checkoff authorizations at least once a year or at the termination of an applicable collective bargaining agreement.<sup>6</sup> Typically, unions accomplish this by providing members with a "window period" of approximately 10 days in length that occurs before the anniversary date of the authorization's execution.<sup>7</sup> Current Board law is that, in certain situations, a member's resignation from the union does not privilege a checkoff revocation outside the window period. Those situations include when the parties' contract contains a union security clause or, absent such a clause, when the checkoff authorization explicitly requires dues payments absent union membership.<sup>8</sup>

Nevertheless, the General Counsel has recently taken the position that current Board law in this area should be reconsidered. In Teamsters Local 270 (UPS), the General Counsel concluded that unions should treat a checkoff revocation filed no more than 90 days before an upcoming window period as an ongoing request that will become effective during that window period.<sup>9</sup> In that case, the union had previously engaged in conduct that interfered with employees' attempts to revoke their checkoff authorizations. Subsequently, an employee attempted to revoke his checkoff authorization about one month before his window period. Only two days before the window period expired, the union

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<sup>6</sup> See generally Frito-Lay, Inc., 243 NLRB 137, 138 (1979).

<sup>7</sup> Id.

<sup>8</sup> See Auto Workers Local 1752 (Schweizer Aircraft Corp.), 320 NLRB 528, 531 (1995) ("resignation of membership by an employee who is obligated to pay dues under a lawful union-security clause does not privilege the employee to make an untimely revocation of his checkoff authorization"), enfd. sub nom. Williams v. NLRB, 105 F.3d 787 (2d Cir. 1996); Steelworkers Local 4671 (National Oil Well, Inc.), 302 NLRB 367, 368 (1991) (union did not violate Act by having employer withhold dues where, despite no union security clause in contract, checkoff authorization sanctioned dues deductions regardless of union membership). Compare Electrical Workers IBEW Local 2088 (Lockheed Space Operations Co.), 302 NLRB 322, 328 (1991) (union violated 8(b)(1)(A) by accepting and retaining dues after member resigned from union where checkoff authorization was based on continued union membership).

<sup>9</sup> Case 15-CB-5256 [*FOIA Exemption 5* .]

informed the employee that it was rejecting his revocation request because it was premature. The union also failed to respond to the employee's request for the specific dates of his window period. Based on these facts, the General Counsel authorized a complaint alleging that the union had violated Section 8(b)(1)(A) by, among other things, not accepting the employee's checkoff revocation.

We conclude that the current case is not a good vehicle to argue that the Board should reconsider current law and accept the General Counsel's "ongoing request" theory. First, in contrast to Teamsters Local 270, the facts do not show that the Union was attempting to manipulate the situation to thwart Lofton's efforts to timely revoke his checkoff authorization. The Region concluded that Lofton never asked the Union for his anniversary date; thus, there was no failure to provide requested information here.<sup>10</sup> Furthermore, even assuming Lofton made the request, he promptly obtained the date from his Employer and so informed Union Representative Aguilar. Moreover, when the Union rejected Lofton's January 31 revocation, Lofton had already informed Aguilar that he had filed an untimely revocation and that he was sending a timely notice. In waiting for Lofton to follow through with his statement and file his timely revocation on February 24, the Union did nothing more than adhere to extant Board law.<sup>11</sup>

Second, there is no evidence here that the Union is otherwise interfering with employee attempts to revoke their checkoff authorizations. Again, this is in stark contrast to Teamsters Local 270, where on prior occasions the union had prevented employees from obtaining their anniversary dates, thereby precluding them from filing timely revocations. Here, the evidence is that on a prior occasion, the Union promptly supplied employee English with her anniversary date upon request.

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<sup>10</sup> Although Lofton stated that he asked Union Representative Aguilar for his anniversary date in mid-January 2005, Aguilar could not recall such a request from Lofton and said he would have complied with any request as he did with employee English. The Region found objective bases to credit Aguilar because: (1) employee English, consistent with Aguilar's statement, confirmed that Aguilar promptly supplied her anniversary date upon request; and (2) Lofton had stated that his January 31 revocation letter contained a second request for his anniversary date and it did not contain such a request.

<sup>11</sup> See Schweizer Aircraft Corp., 320 NLRB at 531. See also American Tel. & Tel. Co., 303 NLRB 942, 943 (1991).

Finally, the result for Lofton would be the same here regardless of which legal principle is applied. Under the General Counsel's ongoing request theory, the Union did not have to honor Lofton's January 31 revocation until his next window period, which was from February 12 to 27. Here, the Union did honor Lofton's revocation during that window period, albeit based on his timely revocation submitted on February 15. Thus, under either the ongoing request theory or extant Board law, Lofton would not be entitled to reimbursement for improperly withheld dues, unlike in Teamsters Local 270, where dues were withheld after the window period closed.

Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K.